IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RANDELL ALLEN,

Plaintiff,

v

BAY AREA RAPID TRANSIT DISTRICT, OFFICER OUKA, OFFICER ENNIS, OFFICER JOE and DOES ONE through FIFTY,

Defendants.

_____/

No C 00-3232 VRW

ORDER

Having reached a settlement with defendants of the underlying claims in this civil rights action, plaintiff has moved for an award of attorney fees and costs under 42 USC § 1988. Doc # 81. For the reasons set forth below, plaintiff's motion for attorney fees and costs (Doc # 81) is GRANTED.

I

Plaintiff commenced this action in Alameda County superior court on August 7, 2000. See Not of Rem (Doc # 1, Exh

A). In his complaint, plaintiff alleged that Bay Area Rapid Transit (BART) police officers unlawfully detained and then arrested plaintiff as part of an ongoing search for a robbery suspect. Id. Plaintiff, an African-American, alleges that, although he did not otherwise resemble the description of the robbery suspect (e g, in age, height and weight, clothing), he was detained and arrested based solely on the fact that he fit the racial profile of the suspect. Id.

Defendants timely removed the action on September 7, 2000. See Not of Rem (Doc # 1). Plaintiff moved to remand. Doc # 3. Plaintiff's motion to remand was denied on October 27, 2000. Doc # 14. Defendants then moved for judgment on the pleadings. Doc # 17. That motion was granted in part and denied in part. Doc # 25. After an amended complaint was filed, the parties filed cross-motions for summary judgment. Docs ## 57, 66. While those motions were pending, the parties reached a settlement agreement and this action was dismissed on October 31, 2002. Doc # 80.

The settlement agreement provided that plaintiff could move for an award of attorney fees, which he did on November 26, 2002. Doc # 81. Due to an oversight, defendants failed timely to oppose the motion for attorney fees and the court issued an order to show cause why the court should not treat plaintiff's motion as unopposed on January 21, 2003. Doc # 85. Defendants filed a return to the court's show cause order and an opposition to plaintiff's motion on January 28, 2003. Doc #86. On February 7, 2003, the court issued an order directing plaintiff to file a reply brief on or before February 20, 2003. Doc # 87.

With no objection from the parties, the court determined that it would rule on plaintiff's motion for attorney fees without oral argument. Id; see Civ LR 7-1(b).

II

A

Section 1988 of Title 42 of the United States Code authorizes a court "in its discretion, [to] allow a prevailing party, other than the United States, a reasonable attorney's fee as part of the costs * * *." Id. Under a fee-shifting statute such as 42 USC § 1988, "a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Hensley v Eckerhart, 461 US 424, 429 (1983).

"The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." Farrar v Hobby, 506 US 103, 111 (1992) (internal quotation marks omitted). Accordingly, "a plaintiff 'prevails' when he or she enters into a legally enforceable settlement agreement against the defendant." Barrios v California Interscholastic Federation, 277 F3d 1128, 1134 (9th Cir 2002). Under this standard, plaintiff is entitled to an award of reasonable attorney fees, a conclusion that defendants do not contest although defendants do contest the amount plaintiff seeks.

"[T]he definition of what is a reasonable fee applies uniformly to all federal fee-shifting statutes." Anderson v Director, Office Workers Compensation Programs, 91 F3d 1322,

1325 (9th Cir 1996) (citing City of Burlington v Dague, 505 US 557, 562 (1992)). To calculate a reasonable attorney fee award, the court must employ the lodestar method. Morales v City of San Rafael, 96 F3d 359, 363 (9th Cir 1996). The lodestar method requires the court to "multiply[] the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." Id.

> The prevailing market rate in the community is indicative of a reasonable hourly rate. The fee applicant has the burden of producing satisfactory evidence, in addition to the affidavits of its counsel, that the requested rates are in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation.

Jordan v Multnomah County, 815 F2d 1258, 1262-63 (9th Cir 1987) (citing Blum v Stenson, 465 US 886 (1984)) (internal citations omitted and emphasis supplied).

Once calculated, the lodestar rate may be adjusted "to account for other factors * * * not subsumed within it." Ferland v Conrad Credit Corp, 244 F3d 1145, 1149 n4 (9th Cir 2001). Those additional factors were first identified by the Ninth Circuit in Kerr v Screen Extras Guild, Inc, 526 F2d 67 (9th Cir 1975), and include at least the following:

> * * * [(1)] the preclusion of other employment by the attorney due to acceptance of the case, [(2)] the customary fee, * * * [(3)] time limitations imposed by the client or the circumstances, * * * [(4)] the 'undesirability' of the case, [(5)] the nature and length of the professional relationship with the client, and [(6)] awards in similar cases.

Id at 69-70; see also Morales, 96 F3d at 363 n9 (identifying the factors subsumed). The amount of recovery, however modest, cannot be used as the basis to reduce a fee award below the lodestar amount. See Caudle v Bristow Optical Co, 224 F3d 1014,

1029 (9th Cir 2000).

A lawyer's appraisal of the value of his own work is, at best, an imperfect measure of the "reasonable" value of that work. Thus, "[u]nder a fee-shifting statute, the court must * * * us[e] the lodestar method" to calculate the reasonable award of attorney fees. Staton v Boeing, 327 F3d 938, 965 (9th Cir 2003) (quoting Ferland v Conrad Credit Corp, 244 F3d 1145, 1149 n4 (9th Cir 2001) (internal quotation marks omitted and emphasis supplied). The lodestar calculation is mandatory and the court has a duty to perform that calculation regardless whether (or how vigorously) defendants object to the fee award sought by a prevailing plaintiff. "This duty exists independently of any objection." Zucker v Occidental Petroleum Corp, 192 F3d 1323, 1328-29 (9th Cir 1999) (discussing the duty of the court to review the reasonableness of an attorney fee provision of a class action settlement); see also Staton, 327 F3d at 964-65 (citing Zucker in discussing the standards by which a district court must review the reasonableness of attorney fee awards authorized by fee-shifting statutes or as part of a common fund). Guided by that mandate, the court turns to the application at hand.

B

Plaintiff has been represented by two attorneys in this matter. Kenneth Frucht is plaintiff's primary counsel. Frucht is a 1995 graduate of the University of San Francisco Law School whose practice largely comprises civil rights litigation. Frucht Decl (Doc # 82) at 1, ¶ 3. Frucht states that he spent

266.1 hours working on this case. Frucht Decl (Doc # 82) at 4, ¶ 16. Of those hours, plaintiff seeks compensation for 260.1 hours. Id at 4, ¶ 17.

Frucht employed Susan Ochs to prepare plaintiff's motion to remand. Frucht Decl (Doc # 82) at 3, ¶ 14. Ochs is a graduate of the Northeastern School of Law who has maintained a solo practice in California for 15 years. Id. Frucht states that Ochs has extensive experience with civil rights cases. Id. Frucht reports that Ochs worked for 24.2 hours on the motion to remand. Id at 4, ¶ 16. Plaintiff seeks compensation for all of those 24.2 hours. Id at 4, ¶ 17.

In total, plaintiff requests compensation for 284.3 hours of labor at an hourly billing rate of $275 for both Frucht and Ochs. Pl Mot (Doc # 81) at 5. The court notes a discrepancy between the hourly billing rate plaintiff requests in his motion for attorney fees ($275) and that which plaintiff's counsel requests in the accompanying declaration ($300). In the declaration of plaintiff's counsel, Frucht uses a reasonable hourly billing rate of $300 and states that "he believe[s that amount] is reasonable given [his] experience and the prevailing rates for attorneys in the San Francisco Bay [a]rea." Frucht Decl (Doc # 82) at 4, ¶ 17. This $300 hourly billing rate multiplied by 284.3 hours produces the $85,290 in total attorney fees plaintiff requests. See Pl Mot (Doc # 81) at 5. Using an hourly billing rate of $275, the total attorney fee award requested would be $78,182.50. In addition, plaintiff seeks an award for five hours his counsel anticipated devoting to preparing a reply brief on the attorney fee motion and

attending oral argument of that motion. Pl Mot (Doc # 81) at 5. At $275 per hour, this request generates an additional award of $1,375 for a grand total of $79,557,50.

As evidence of the reasonableness of an hourly billing rate of $275 for the services of Frucht and Ochs, plaintiff points to two sources of evidence. First is a declaration by Frucht. Doc # 82. In his declaration, Frucht states that he is familiar with the billing rates for private sector attorneys practicing in the Bay area and that, based on his understanding and belief, it would be reasonable to pay a Bay area attorney of 6 or more years experience in civil rights litigation between $250 and $300 per hour and a Bay area attorney of 14 or more years experience between $295 and $370 per hour. Frucht Decl (Doc # 82), at 4-5, ¶ 15.

The court has already noted the uncertainty attending an attorney's appraisal of the value of his own services. Furthermore, the Ninth Circuit requires a plaintiff to support his fee application with evidence "in addition to the affidavits of * * * counsel." Jordan, 815 F2d at 1262-63. To that end, plaintiff has furnished, with his reply brief, a declaration by Rodney R Patula, a partner with Squire, Sanders & Dempsey LLP, previously submitted in another civil rights action tried by Frucht in November 2001. Supp Frucht Decl (Doc # 89) at 1-2, ¶ 4, Exh A. Frucht explains his inability to produce the Patula declaration at the time plaintiff filed his motion for attorney fees as the result of a confusion within Frucht's office over the location of a copy of that declaration in Frucht's files. Id at 2, ¶ 5-6.

As a threshold matter, plaintiff nowhere demonstrates the relevance of the Patula declaration to this action. Plaintiff presents the court with no information concerning the prior action for which Patula prepared and submitted his declaration. Absent such information, the court lacks a basis to conclude that the contents of the Patula declaration are relevant to Frucht's prosecution of the action at bar.

In his declaration, Patula, a specialist in complex and multi-district litigation, commercial litigation, securities litigation and appeals, reports that, in his capacity as chair of the Advocacy Practice Groups in Northern California for Squire Sanders, he is required to keep abreast of prevailing hourly rates for attorneys in the Bay area. Patula Decl (Doc # 89, Exh A) at 2, ¶¶ 3-5. Patula states his opinion that the hourly rates charged by attorneys in the area depends largely on the number of years an attorney has practiced. Id at 2, ¶ 6. He further states his belief that an associate of four to six years experience in the San Francisco Bay area would typically charge $250 to $300 per hour and an associate or partner of twelve to fifteen years experience would typically charge $300 to $370 per hour.

Patula reports that he has worked extensively with Frucht and can attest that Frucht's skill level is "superior to virtually all the five year associates I have worked with in my [twenty-five] years of practice." Patula Decl (Doc #82, Exh A) at 3, ¶ 9. Patula concludes by stating his opinion that "Frucht's work on a litigation matter in the private sector San Francisco legal market would warrant a fee of not less than $275

per hour." Id at 3, ¶ 10. Patula draws no distinction between the fees Frucht might reasonably charge for civil rights litigation and those he might charge for pursuing other (more or less complex) litigation. Certainly, the kind of commercial and business litigation with which Patula claims familiarity differs materially from the lawsuit at bar.

Although the court has no quarrel with Patula's credentials, the court questions the relevance of the Patula declaration to the court's lodestar calculation in this action. The court has already stated its reservations regarding the relevance of a declaration prepared and filed for submission in another action to the court's consideration of plaintiff's motion for attorney fees in this case. Based on the information before it, the court cannot know, for example, whether Patula would prepare and sign the same or a similar declaration under oath in support of plaintiff's motion for attorney fees in this action. The court has no way of knowing whether the action in which Patula's declaration was originally filed involved analogous claims, whether those claims were more or less complex than those at issue in the case at bar or whether Patula would consider an hourly rate of $275 (or more or less) reasonable for the services performed by Frucht (let alone Ochs) in this action.

In addition, as noted, Patula's experience appears to be in rather markedly different litigation from this. And, perhaps most significantly, the court questions Patula's qualifications to opine on what is essentially a matter of economics, as distinguished from law. Patula is not an

economist or professional trained in evaluating the market for legal services. Patula is a seller of legal services, not a buyer or disinterested observer of the marketplace. This fact reflects no discredit on Patula as a lawyer, but negates a credential as an objective source of information about the value of legal services. Furthermore, the information Patula furnishes is simply inadequate to demonstrate the reasonableness of the hourly rate plaintiff urges the court to employ. Patula's declaration lacks points of reference that would enable the court to conclude that the figures he cites are in fact rates actually charged and (perhaps more importantly) collected by attorneys of comparable skill and reputation in cases of comparable difficulty. The figures Patula quotes are, in effect, attorneys' posted prices, not the real prices of their services. Patula nowhere discusses discounts that lawyers and law firms typically offer to clients, discounts that are often very substantial in relation to posted hourly fees. Nor does Patula discuss write-offs of time or charges that lawyers and law firms commonly make – sometimes to reflect wasted or unproductive efforts or as an accommodation to clients. In short, Patula leaves out substantial information necessary for the court to determine the customary hourly fees of lawyers practicing in the San Francisco Bay area.

Finally, although Patula declares that, in his opinion, Frucht is an attorney of skill and ability (a proposition the court does not question), Patula says nothing that could lead the court to conclude that this case called for the skill and ability Patula claims Frucht possesses. And, of course, aside

from the declaration of co-counsel Frucht, the court has been presented with no additional information concerning Ochs' level of skill or reputation within the community.

C

On the basis of the limited presentation before the court, plaintiff would have the court approve an award of attorney fees based on a reasonable hourly rate of $275 for the services of Frucht and Ochs. Defendants argue that an hourly billing rate of $275 is unreasonably high and propose an award based on an hourly rate of no more than $230. Def Opp (Doc #86) at 5, ¶ 13. Defendants claim that plaintiff's case involved "a routine and unremarkable claim of excessive force and unlawful force" and so does not warrant a premium rate. Id at 4-5, ¶¶ 12-13. But defendants, like plaintiff, offer only conjecture for their figure of a reasonable hourly fee.

The lodestar calculation must be linked to hourly rates "prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation." Jordan, 815 F2d at 1262-63. As discussed, Patula's declaration contains no information regarding the data on which Patula bases his conclusion that an hourly rate of $275 would be reasonable for the court to apply to Frucht's work on this case. As a result, the court must look elsewhere for substantiation of what is a reasonable rate for attorney services in the community.

Recent Census data, drawn from the Statistical Abstract of the United States: 2001, indicate that gross receipts for law partnerships nationwide totaled $66 billion in 2001. See US

Census Bureau, Statistical Abstract of the United States: 2001, (121st ed) (Stat Abs), tbl 712. Net receipts for those partnerships totaled $26 billion. Id. The ratio of net to gross receipts was 39.39%. The ratio of net to gross receipts for proprietorships was higher, 48.15%, but the court focuses here on the ratio for partnerships, a figure more favorable to plaintiff's counsel.

Relying on Census data for the San Francisco, California primary metropolitan statistical area, the BLS has calculated employment and wage estimates for a wide range of employment categories, including lawyers, for the year 2001. See United States Department of Labor, Bureau of Labor Statistics, "San Francisco, CA PMSA – 2001 OES Metropolitan Area Occupational Employment and Wage Estimates," available at http://www.bls.gov/ oes/2001/oes_7360.htm. For lawyers employed in the San Francisco metropolitan area, the BLS estimates the median hourly wage at $57.33 and the mean hourly wage at $54.01. See id, "Legal Occupations." Employing the higher median figure, $57.33, and dividing that amount by 39.39% – the ratio of net to gross income for law partnerships derived from the national census data – yields a figure of $145.54 as a rough average billing rate for the entire spectrum of San Francisco area lawyers, including attorneys working in private firms of all sizes, in-house counsel, solo practitioners, attorneys employed by nonprofit organizations and attorneys employed by the local, state and federal government. This average appears accurately to reflect the going rate in the San Francisco legal community for legal services across a broad range of practice

areas. In sum, the BLS and Census data reflect an approximate "customary fee" of $150 per hour for lawyers in the Bay area. This approximation, unlike that submitted by the attorneys herein, is drawn from objective data compiled by disinterested governmental agencies.

To be sure, the court does not claim that its analysis is definitive or the last word on the customary hourly fee of lawyers practicing in this region. Plainly, comparability problems exist in weighing hourly charges of lawyers in private practice as against lawyers working in-house for businesses, universities, public agencies or in academic institutions. Nor does the court suggest that the census BLS data referred to are the best data available. Lending institutions that finance law firm operations, accounting firms and legal recruiting firms compile and analyze lawyer charges and have an economic incentive to obtain an accurate and comprehensive picture of customary attorney charges. Furthermore, insurance companies and other entities that employ lawyers in private practice closely monitor attorney fees. No data from these sources have been presented here. In the absence of any other credible measure of the "customary fee" of San Francisco Bay area attorneys (and plaintiff presents no such evidence), the court's approximation drawn from government sources will have to do. Nor has plaintiff demonstrated reasons that his counsel should be compensated at a level greater than the average going rate for lawyers in the area.

Based on the evidence before it, the court has no basis for employing a reasonable hourly billing rate in its lodestar

calculation either greater or lower than the approximate local average of $150 discernible from publicly available data described above. Some (perhaps many) attorneys command higher (possibly much higher) hourly fees. But the parties have not spelled out any factors or reasons that the court can use to justify a higher fee. Accordingly, the court concludes that Frucht and Ochs are entitled to an attorney fee award calculated using a reasonable hourly billing rate of $150.

D

Defendants have raised three objections to plaintiff's request that his counsel be compensated for 284.3 hours of work on this case. First, citing Thorne v City of El Segundo, 802 F2d 1131 (9th Cir 1986), defendants argue that the court should disallow a fee award for any hours expended by plaintiff's counsel in moving unsuccessfully to remand the case to state court or for summary judgment on plaintiff's claims. Defendants cite Thorne for the proposition that "the final fee award may not include time expended on [] unsuccessful claims." Id at 1141.

In Thorne, the Ninth Circuit set forth a two-part analysis a court must conduct in cases in which a plaintiff prevailed only partially.

> First, the court asks whether the claims upon which the plaintiff failed to prevail were related to plaintiff's successful claims. If the unsuccessful and successful claims are related, then the court must apply the second part of the analysis, in which the court evaluates the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Id at 1141 (citing and quoting Hensley, 461 US at 434-35; internal quotation marks omitted).

The test articulated in Thorne involves the differentiation of successful and unsuccessful claims. An unsuccessful motion is not an unsuccessful claim. Under the rule proposed by defendants, a plaintiff who prevailed at trial would be entitled to recover the costs of trying certain claims, but not, e g, the costs of filing and arguing an unsuccessful motion for summary judgment on those claims. Such a rule would undermine the purpose for which federal fee-shifting provisions were enacted: "to encourage private enforcement of [] statutory substantive rights, whether they be economic or noneconomic, through the judicial process." Report of the Third Circuit Task Force, Court Awarded Attorney Fees, 108 FRD 237, 250 (3rd Cir 1985).

Defendants cite neither binding nor persuasive authority that hours reasonably spent by a prevailing party's counsel preparing, filing and arguing motions that were either unsuccessful or undecided at the time of settlement should not be compensated in an attorney fee award under 42 USC § 1988.

As part of the settlement, both parties agreed that plaintiff's counsel would not be compensated for work performed on advancing plaintiff's claim, based on the Supreme Court's holding in Monell v New York City Dept of Social Services, 436 US 658 (1978), that defendant BART failed properly to train and/or supervise defendant officers. Frucht Decl (Doc # 82) at 3, ¶ 12. Defendants argue that plaintiff's request for compensation for ten hours spent preparing and reviewing

plaintiff's first request for production of documents be reduced by half to reflect the portion of those requests relating to the now abandoned Monell claims. Def Opp (Doc # 86) at 6-7, ¶ 21; Exh C. Plaintiff counters that the majority of the discovery sought through the first request for production of documents is relevant to other claims and to the impeachment of defendant officers. Plaintiff argues that any reduction in the number of hours relating to these tasks should be, at most, forty percent of the hours requested (or four hours), because that reflects the approximate percentage of requests for production that relate to the Monell claims exclusively. Pl Rep (Doc # 88) at 4; Def Opp (Doc # 86), Exh C.

The court agrees with defendants that a deduction of some of these hours is appropriate to reflect the amount of time spent pursuing the abandoned Monell claims. The court agrees with plaintiff that a forty percent reduction accurately reflects the ratio of production requests related wholly or primarily to the abandoned Monell claims and those related to claims on which plaintiff ultimately prevailed (for the purposes of the attorney fee award calculation). Accordingly, the court will subtract four hours from the total number of hours included in the lodestar calculation.

Defendants' final argument with respect to the number of hours for which plaintiff's request compensation is that plaintiff expended too many hours in performing certain tasks: drafting the complaint (13.9 hours) and opposing defendants' motion for judgment on the pleadings (51.7 hours). Defendants insist that these times should be reduced by one-third. Def Opp

(Doc # 86) at 6, ¶ 20. Yet defendants offer no argument in support of this contention. Absent evidence more persuasive than defendants' bald assertion to the contrary, the court cannot consider the number of hours plaintiff's counsel represents having spent drafting and filing the complaint or opposing the motion for judgment on the pleadings to be unreasonable under the circumstances.

Based on the foregoing, the court concludes that, with the exception of four hours spent on preparing and reviewing materials relating to plaintiff's request for production of materials relevant to his now abandoned Monell claims, the number of hours for which plaintiff requests compensation for his counsel's past work is reasonable. Accordingly, the court determines that plaintiff's counsel should be compensated at a reasonable hourly rate of $150 for 280.3 hours of work performed up until the date of filing of the motion for attorney fees.

Because the court vacated the hearing on plaintiff's motion for attorney fees, the court determines that plaintiff's counsel should not be compensated for an additional five hours of work plaintiff anticipated performing to prepare and file the reply brief on plaintiff's attorney fee motion and to argue that motion before the court. The court concludes that an award of an additional three hours of attorney fees is adequate to compensate plaintiff's counsel for the minimal effort evidently expended in preparing and filing plaintiff's reply brief.

Neither party requests, nor does the court find appropriate, an adjustment of the presumptively reasonable lodestar figure (up or down) based on factors not subsumed

within the lodestar calculation itself.

Thus, based on a reasonable hourly billing rate of $150 for Frucht and Ochs and a reasonable number of hours worked of 283.3, the court adjudges that an attorney fee award of $42,495 in attorney fees is reasonable to compensate plaintiff's counsel, pursuant to 42 USC § 1988.

E

In addition to attorney fees, plaintiff requests costs of $1,687.34. See Frucht Decl (Doc # 82, Exh A) at 1. Plaintiff's costs are reasonable and defendant has filed no objection to them. In addition to the attorney fee award discussed above, plaintiff is entitled to an award of $1,687.34 for costs incurred during this litigation.

III

Pursuant to 42 USC § 1988, plaintiff's motion for an award of attorney fees (Doc # 81) is GRANTED. The lodestar amount of attorney fees in this action is $42,495. Defendants are directed to pay plaintiff's counsel that amount. The amount of reasonable costs is $1,687.34, which defendants shall also pay plaintiff's counsel. On or before August 22, 2003, defendants shall file a declaration of counsel stating that the award of reasonable attorney fees and costs has been paid. Upon

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receipt of that declaration, the clerk is directed to close the file and terminate all pending motions.

IT IS SO ORDERED.

/s/
VAUGHN R WALKER
United States District Judge